STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc.,	:	
SBC Delaware Inc.	:	
Ameritech Corporation,	:	
Illinois Bell Telephone Company	:	
d/b/a Ameritech Illinois, and	:	
Ameritech Illinois Metro, Inc.	:	
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	:	98-0555
Joint Application for approval of the	:	
reorganization of Illinois Bell Telephone	:	
Company d/b/a Ameritech Illinois Metro, Inc.	:	
in accordance with Section 7-204 of the	:	
Public Utilities Act and for all other appropriate	:	
relief.	:	

BRIEF ON EXCEPTIONS ON REOPENING OF 21ST CENTURY TELECOM OF ILLINOIS, INC.

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Dated: August 17, 1999

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Pursuant to 83 Illinois Administrative Code Part 200, 21st Century Telecom of Illinois, Inc. ("21st Century") hereby submits its Brief on Exceptions on Reopening in this proceeding.

INTRODUCTION

In the Hearing Examiner's Proposed Order on Reopening ("HEPO"), the examiners find that Southwestern Bell Telephone Company's ("SBC" or "the Company") merger with Ameritech Illinois should be approved under both IL Rev. Stat. 220 § 5/7-204 of the Public Utilities Act ("the Act") and the Department of Justice Horizontal Merger Guidelines ("DOJ Merger Guidelines").

The HEPO finds that the record evidences SBC's plans to enter Illinois markets. However, the HEPO now inexplicably finds that the SBC would not have a deconcentrating effect on the market. This HEPO reaches even farther afield than the first proposed order to justify this merger.

The HEPO fails to adequately address the dichotomy between SBC's assertions and Illinois law. Because SBC is a potential entrant in this state, the merger fails under 7-204 because a merger of potential rivals is illegal. Even assuming that there was no evidence of SBC's intent to enter the Illinois market, the Joint Application still fails the other set of regulatory standards the HEPO relies on – the DOJ Merger Guidelines. And just as the first proposed order in this case failed to reconcile SBC's intent to enter Illinois with its extraordinary resources as an ILEC, the current HEPO attempts to paint all potential entrants with the same brush, regardless of their size, financial capitalization or technical capabilities. There is a clear distinction between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). For instance, the record testimony in this proceeding demonstrated the current advantages SBC enjoys with its affiliate assets in Illinois that can be used for local wireline operations.[1] Thus, the HEPO's ultimate finding that the merger will not harm competition is untenable, both as a matter of record evidence and on the face of the meaning of competition in the local exchange market.

[1] See ICC Ex. (Graves) at 28; SBC has built extensive switching and trunking facilities to serve customers and maintain back office facilities, such as billing and OSS, useful for both its wireline and cellular operations. See also MCI Ex.1.1 (Porter) at 11.

Illinois law mandates that the ICC reduce the role of government regulation of telecommunications.[2] The HEPO, through the suggested conditions of merger approval, including Joint Applicants' option to challenge the status of "similarly situated" carriers, guarantees the imposition of more regulation and protracted litigation by the Joint Applicants.

ARGUMENT AND EXCEPTIONS

1. Application and Analysis of State and Federal Precedent on the Proposed Merger

A . The Joint Application Fails Under Either Illinois or FCC Public Interest Standards.

This merger fails under Section 7-102 of the Act and the public interest standard as it is used in Illinois and federal cases.[3] The HEPO suggests that the DOJ Merger Guidelines provide the starting point in the analysis of the competitive effects of this proposed merger. Utilizing these same standards, the FCC has maintained that such mergers must be reviewed in the light of the public interest standard.[4] The FCC has found in nearly identical mergers that the burden of proof rests on the applicants to show whether the proposed merger is in the public interest.[5] Thus, regardless whether the Commission chooses to follow either state or federal analysis, it should only approve this merger upon an affirmative showing by the Joint

[2] See e.g., IL Rev Stat 220 Sec. 5/13-103(b).

[3] See, 21st Century's Initial Brief at 8-10, and generally, Brief on Reopening at 6-7.

[4] *SBC/SNET Order*, 13 FCC Rcd. at par. 13.

[5] Id.

Applicants that this merger is in the public interest.

In the SBC/SNET order, the FCC established guidelines for determining whether a transfer of control of authorization and licence in connection with a merger would have a significant adverse effect on competition.[6] As with the FCC, the ICC must use the public interest standard, not the antitrust standard advocated by Joint Applicants. Pursuant to Sections 214(a) and 310(d) of the Federal Act, the FCC must find that the proposed transfer serves the public interest:

> The legal standards . . . require [the Commission] to weigh the potential public interest harms against the potential public interest benefits and to ensure that, on balance, the merger serves the public interest which, at a minimum, requires that it does not interfere with the objectives of the Communications Act. The analysis necessarily includes an evaluation of the possible competitive effects of the transfer, and the Applicants bear the burden of proving that their transaction, on balance, serves the public interest. Where necessary, the Commission can attach conditions to the transfer of authorizations or licences in order to ensure that the public interest is served by the transaction.[7]

Additionally, in its approval of the AT&T/TCI merger, the FCC recently reaffirmed its commitment to expand its review of mergers beyond the strictures of the Clayton Act.

> This analysis must include, among other things, consideration of the possible competitive effects of the transfer. Our public interest analysis is not, however, limited by traditional antitrust principles. In the telecommunications and cable industries for which we have statutory responsibility; as in most other states, competition is shaped not only by antitrust

[6] *SBC/SNET Order*, 13 FCC Rcd., para 13; and see Sprint Ex. 2.0 (Woodbury).

[7] Id.

rules, but by the regulatory policies that govern the interactions of firms inside the industries.[8]

[8] *In the Matter of Applications for Consent to the Transfer of Control of Licence and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, CS Docket 98-178, Memorandum Opinion and Order, FCC 99-24, par. 14 (Released February 18, 1999).

Rather than relying on merger guidelines, which are used for antitrust purposes in other industries, a public utility commission should employ the merger standards applicable to telecommunications cases. It is this latter standard which the FCC has consistently used. The HEPO must affirmatively demonstrate that the Joint Applicants bear the burden of proving that this merger will be in the public interest. The HEPO fails to adequately address the burden of proof issue and instead assesses the activities of other carriers. HEPO at 31-32.[9] The HEPO improperly ignores federal precedent as established in the SBC/SNET Order and other cases.[10] When the FCC applied the DOJ Guidelines, it has found that the burden is on the Applicants to show that the proposed transaction is in the public interest. The HEPO mistakenly refers to assertions about other competitors, e.g., AT&T and MCI, as the basis for the conclusion to approve the merger. To switch the burden of proof in this manner constitutes reversible error.

If the Commission were to apply the standards consistent with the FCC's review, it would be apparent that the record does not support the alleged benefits of this merger. There is no promise of lower prices for consumers or an indication that the industry will become more competitive. The HEPO fails to substantively demonstrate how this Application will assist consumers or competition. In the absence of such a finding, there is no proof that this merger will serve the public interest. Therefore, the Joint Applicants have failed to meet the most important aspect of the DOJ Guideline standards, as interpreted by the FCC in similar merger reviews. Joint Applicants did not show the proposed merger to be in the public interest.

21st Century, therefore, believes the Commission should add the following to the

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[9] Page notations for the HEPO refer to the ICC's electronic Word version found on its web site.

[10] *SBC/SNET Order*, 13 FCC Rcd., para 13.

language at page 29 of the HEPO:

> The Commission also must note that in identical mergers to the one at hand, the Commission, as well as the FCC, must use a public interest standard as was used in the SBC/SNET merger analysis.

In addition, 21st Century also takes exception and believes that the Commission should add this language at page 29 of the HEPO:

> As with the FCC, the ICC must use the public interest standard, not the antitrust standard advocated by SBC. In applying the DOJ Merger Guidelines, the FCC has found that proposed mergers, such as the one before us, must meet a public interest standard in addition to the Guideline standards, pursuant to Sections 214(a) and 310(d) of the Federal Act. Also, under 7-204(b)(6), this Commission must use a public interest standard. This analysis includes reviewing competitive effects of a transfer. The Joint Applicants bear the burden of proving that their proposed merger would serve the public interest. The Joint Applicants, however, have failed to meet their burden of proof that this merger is in the public interest.

B. The HEPO Incorrectly Concludes that SBC and Ameritech Meet the Actual Potential Competition Doctrine in the Merger Guidelines.

The HEPO addresses the five points listed in ICC Staff's analysis of the potential competition doctrine of the Merger Guidelines. Unfortunately, the HEPO strictly construes the purpose of the Merger Guidelines and misapplies the case law to the facts herein.

Under the guidelines, a showing of an adverse effect from a merger or acquisition on potential competition is determined through the application of the Actual Potential Competition Doctrine. 21st Century asserts that the Joint Applicants fail to meet elements 4 and 5 of the doctrine. As set out by the ICC Staff, the Actual Potential Competition Doctrine requires all of the following elements:

(1) **The market is concentrated**. The proposed order is in agreement with Staff that the evidence establishes a significantly concentrated market for local service.

(2) **The acquiring firm plans on entering the market through the acquisition of a dominant firm**. The proposed order concurs that Ameritech Illinois is the dominant provider within the market.

(3) **The acquiring firm would have likely entered the market either through *de novo* expansion or a toe-hold acquisition in the near future in the absence of the merger**. The proposed order views factors such as SBC's geographic proximity, physical assets, and cellular experience in Illinois as relevant to its "likely" entry. Those factors support Staff's position that SBC would act to increase profits in the absence of acquisition, and that such a desire to increase profits would likely bring SBC to Illinois in perhaps 3-5 years.

(4) **Either *de novo* entry or entry through a toe-hold acquisition by the acquiring firm would have been likely to deconcentrate the market or result in other pro-competitive effect**. The HEPO, contrary to 21st Century's assertion, found that the impact from SBC's likely independent entry into Illinois' local exchange market would not be significant.

(5) **An insufficient number of similarly situated alternative entrants exists.** The HEPO, relying on the 1984 DOJ merger guidelines, determined that Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth, and USWEST) after the merger. However, as 21st Century demonstrated, case law does not mandate such a strict interpretation of the Merger Guidelines to the point of eviscerating the public interest standard or ignoring common sense.

C. The Proposed Merger Will Adversely Affect Competition in Illinois.

Applying the Guidelines to the facts in this case, 21st Century maintains that the merger would negatively affect potential competition in Illinois.[11] 21st Century concurs with the HEPO in the opinion that SBC is a likely potential entrant in Illinois.[12] Given that the HEPO has found that SBC is a likely potential entrant, it is curious then that the examiners conclude that the merger

[11] See Generally, 21st Century's Initial Brief at 16.

[12] HEPO at 31.

would not significantly effect potential competition in Illinois. The HEPO states, "...we find that the impact from SBC's likely independent entry into Illinois' local exchange market would not be significant. When we examine the various parties' assertions, they invariably suggest that SBC's entry would be limited in scope and geared to capture large business customers." HEPO at 31. Further, the HEPO finds that even though SBC could likely enter the local market in the next three to five years, it is improbable that SBC will be able to single-handedly deconcentrate the market or obtain a significant share of the market anymore than other competitors combination with other entrants. This unsupported conclusion of the HEPO is against the manifest weight of the evidence and constitutes reversible error.

As 21st Century demonstrated in its various filings in this case, removing a significant potential entrant, an ILEC such as SBC, will have a detrimental impact on competition.

D. SBC's Entry Into Illinois <u>De Novo</u> Would Have a Substantial Deconcentrating Effect.

In briefs before this Commission, 21st Century recommended that the Commission find that the merger has a "significant adverse effect" on competition and it should be denied unless the Joint Applicants accept tough conditions that guarantee a competitive market.

Nevertheless, the HEPO rejects conditions beyond those already proposed by Joint Applicants and finds that the merger will not have an adverse effect on competition. Thus, the reopened proceedings resulted in few additional findings separate from those contained in the companies' proposals. Further, all of Joint Applicants' "new" evidence simply restated previously challenged assumptions without providing the necessary support under Illinois law.

The Proposed Order finds that the merger will not harm competition because large carriers such as AT&T, MCIWorldcom and Sprint will be entering the Illinois local exchange market. Thus, the proposed order states:

> There is no evidence that SBC would have more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCIW, and Sprint, all of which have significant technical and capital resources, ILEC experience, and national brand names.
>
> . . .
>
> As mentioned earlier, SBC is not one of only a few potential competitors of Ameritech Illinois. To the contrary, Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth, and US West) after the merger.

HEPO at 30-31.

The HEPO then concludes that the merger will not have an adverse impact on competition because "it is improbable that SBC will be able to single-handedly deconcentrate the market or obtain a significant share of the market anymore than other competitors combination with other entrants." HEPO at 31. This finding is untenable. There is no evidence to suggest that SBC's entry would <u>not</u> have a deconcentrating effect.

On the contrary, 21st Century has suggested there is an abundance of evidence that SBC, as an efficient local exchange provider, would be extremely capable in entering Illinois markets more effectively and with greater impact on local services than companies like AT&T, MCI or Sprint. In fact, given the numerous false starts for competitive entry by companies such as AT&T or TCI etc., it is difficult to make any assumptions regarding various CLEC business strategies. Ameritech's other competitors (AT&T, MCI, Sprint, Bell Atlantic, U S West and BellSouth) are not nearly as effective as SBC.[13] AT&T, MCI and Sprint are long distance companies, not entrenched "local exchange"companies with a solid customer base of monopoly non-competitive service customers. Long distance providers can lose their customers at the "drop of a hat." Furthermore, long distance carriers (or any CLECs) do not have the local market experience that SBC has perfected over the last one hundred years. Nor do nascent competitors have the extensive facilities (i.e. billing and customer services) that SBC possesses. As the record reflects, ICC Staff found that SBC can leverage its facilities experience from its Cellular One business to use in offering wireline services. For instance, ICC Staff found that SBC has built extensive switching and trunking facilities to serve customers and maintain back-office facilities, such as billing and OSS, that are useful for both its wireline and cellular operations. Staff Ex. (Graves) at 28. See also MCI Ex.1.1 (Porter) at 11. SBC is more powerful than any CLEC or IXC in the relevant local exchange market and it is thus untenable to say that MCI or AT&T have similar abilities as SBC. Based on the evidence, the Commission can conclude that only SBC's entry into the local service market would have a substantial deconcentrating effect.

Unlike SBC, companies like AT&T, MCI and Sprint do not have the *de facto* local monopoly profits to draw from in order to effectively compete. With its monopoly, SBC is uniquely situated just miles away from Illinois, poised to enter its local markets. Factors such as SBC's customer base, geographic proximity, physical assets, and cellular experience in Illinois are among the vital differences between SBC and other CLECs that simply cannot have the significant

[13] While SBC paints some CLECs to be global telecom players, in fact only one or two companies, AT&T and MCI, probably have the resources in the future to become "all-in-one" telecommunications giants. However, no other CLEC has put together the local exchange piece of the business – the most profitable – and the HEPO should recognize this. Ameritech itself will be a global player, as evidenced by its recent purchase of 20% of Bell Canada.

deconcentrating effect that SBC could cause if it entered Illinois *de novo*. Thus, the merger would have a significant adverse effect – as that term is used in Section 7-204(b)(6) – on potential competition in the Illinois telecommunications markets.

Similarly, the HEPO's reliance on other Regional Bell Operating Companies ("RBOCs") is misplaced. HEPO at 32. Unlike SBC, carriers like US West and Bell Atlantic have not shown the same level of interest in Illinois. US West has the largest rural customer base, with the highest attendant cost of service of all the RBOCs. US West has not demonstrated the financial capability to compete in Illinois. Finally, unlike SBC, Bell Atlantic and Bell South have not shown the desire to enter Illinois. Furthermore, these companies have not made the same financial commitment in Illinois as SBC. Only SBC has such a lucrative 1 million customer base in Illinois from which to launch an effective competitive strategy. Thus, there is "no equal" to SBC's competitive influence on the Illinois market as a potential competitor. There are numerous other certificated local carriers, both facilities and non-facilities based. However, none of these carriers has the number of customers, the financial capitalization or the long history of presence SBC has within the state.

Therefore, no other carrier possesses such favorable monopoly arrangements in tandem with its captive customer base. SBC has this unique opportunity to leverage its monopoly local service relationship with the telecommunications needs of large corporations in and beyond the expanded regional markets. Nonetheless, SBC asserts that irrespective of its golden position as the third largest local exchange carrier in the United States and the ninth largest in the world[14], it

[14] GCI Ex. 1.0 (Selwyn) at 24.

“lacks a sufficiently broad customer base to allow SBC to be competitive[15] with firms such as AT&T, MCI or Sprint, even though these companies do not have the local exchange presence enjoyed by SBC.

Thus, 21st Century takes exception and believes that the Commission should remove the language at the end of page 31 and the beginning of page 32 of the HEPO and replace it with the following:

> SBC is an unique potential competitor of Ameritech Illinois. Ameritech’s other competitors (AT&T, MCI, Sprint, Bell Atlantic, US West and BellSouth) are not nearly as effective competitors as SBC. Further, there is no equal to SBC’s competitive influence on the Illinois market as a potential competitor. There are numerous other certificated local carriers, both facilities and non-facilities based, but none of them has the number of customers, the capitalization or even the operational history SBC has in Illinois.

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[15] AT&T Ex. 1.1 (Gillan) at 8; and, see Kahan (SBC), FCC Affidavit, at 76.

The FCC stated that an ILEC has the ability to discourage entry by not interconnecting its network with the new entrant or by insisting on unreasonable interconnection conditions.[16] This merger will magnify such abilities and incentives. Clearly, a combined SBC and Ameritech will be twice as large as when they were separate entities. That means that CLECs themselves would each have to grow twice as large to fight with equal force.[17]

SBC and Ameritech already engage in exclusionary behavior by refusing to provide services to CLECs at parity with the services they provide themselves. (And see i.e., Section II below) For example, the Commission found that Ameritech does not provide OSS to CLECs at parity with the service it provides to itself.[18] Moreover, Ameritech does not offer unbundled local switching on a nondiscriminatory basis.[19]

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[16] *SBC/SNET Order*, 13 FCC Rcd., para 13.

[17] Sprint Ex. 2.0 (Woodbury) at 27.

[18] Sprint Ex. 2.0 (Woodbury) at 27.

[19] Id.

SBC has acted in the same fashion. The California Commission has received complaints that SBC was warehousing collocation sites for its own DSL service, subjecting CLECs to excessive delays in providing caged collocation space and charging excessive rates for collocation.[20] Finally, SBC was criticized by the Texas PUC for failing to meaningfully negotiate and implement the terms of arbitrated agreements, and for taking other steps that inhibited competitive entry.[21] Again, no other carrier - not AT&T, MCI or Sprint – is able to exert any control over local facilities in a manner that leaves the customer unable to take their business elsewhere.

This merger would put extraordinary power in the hands of the Applicants and weaken CLECs. Sprint's witness Woodbury testified that the merger would weaken competitors in both the Ameritech region and in the SBC region.[22] SBC and Ameritech will, therefore, reap the rewards of doubling the harmful effects on competitors through exclusionary behavior. SBC and Ameritech will receive even more incentive to hurt the competitive chances of their rival CLECs through exclusionary behavior such as unreasonable interconnection conditions.[23]

Given the prospect of a monolithic incumbent exchange carrier, CLECs should have the ability to choose interconnection arrangements and agreements that SBC and its affiliates have arbitrated. The HEPO addresses this issue in the Commission's Analysis and Conclusion at page 51. 21st Century concurs with the finding that CLECs should have the option to "opt in" to such

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[20] Id., at 29.

[21] Covad Ex. 1.0 (Deanhardt) at 13-23.

[22] Sprint Ex. 2.0 (Woodbury) at 33.

[23] Id. at 34.

arrangements and agreements. This will ensure that the ICC's resources are not misused by extended legal fights over issues already addressed in prior public utility commission orders.

The Commission's resources will be further conserved, however, by the removal from the order of the proposed Joint Applicants' "similarly situated" caveat regarding arbitrated agreements. As the record demonstrates this added language is unnecessarily vague and improperly extends the criteria contained in Section 252 of the federal Act. ICC Ex. 4.02 (Graves) at 20.

Thus, 21st Century takes exception to the language in the HEPO and believes that the Commission should remove the language in the last paragraph of the HEPO at page 51 and replace it with the following:

> We find that this merger would put extraordinary power in the hands of the Applicants and weaken competitors in both the Ameritech region and in the SBC region. SBC and Ameritech will reap the rewards of doubling the harmful effects on competitors through exclusionary behavior. Thus, we find that there is great deal of evidence that the merger would increase Ameritech's incentive or ability to discriminate against CLECs.

Additionally, the HEPO should be amended on pages 51-52 of the HEPO with the following:

> This Commission will carefully review any claims by Joint Applicant that the provision of certain facilities are technically infeasible.

II. The Record Evidences Significant Impediments To Competition In Illinois.

One of the defects in the HEPO's analysis is that it focuses only on large carriers. With their size and financial resources, AT&T and the other large national carriers will be able to fend for themselves. However, smaller carriers will not have the financial and logistical means to overcome the barriers thrown up by Ameritech and SBC - barriers that will only be worse under a combined company. Examples of Ameritech's anti-competitive conduct against smaller carriers were provided by 21st Century witness Ms. Smoot, Global Com Inc. witness Shave and McLeod witness Conn. Each witness provided graphic examples of Ameritech's efforts to hinder local exchange competition between small carriers and Ameritech. The companies' commitments do nothing to allay these concerns. In fact, the HEPO does not even mention this testimony.

By focusing its analysis on large carriers, the HEPO ignores the significant adverse impact the merger would have on smaller carriers like 21st Century. The HEPO brazenly asserts that the concerns raised by competitive carriers, such as 21st Century, are just "speculation". HEPO at 30. The HEPO ignores the hard evidence presented on the record by CLECs of the current anti-competitive actions by Ameritech. 21st Century Ex.1.0 (Smoot). The examiners seem content to leave competition in Illinois to an oligopoly of large carriers. Customers in Illinois would not be able to take advantage of the unique services that companies like 21st Century can provide. 21st Century believes the Commission should find that there is great deal of evidence that the merger would increase Ameritech's incentive and ability to discriminate against CLECs. As the record indicates, the Applicants have both the ability and incentive to discourage CLEC entry into their local markets. The FCC found that:

> Because an ILEC currently serves virtually all subscribers in its local serving area, an ILEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market.[24]

[24] Sprint Ex. 2.0 (Woodbury) at 10.

As 21st Century's testimony clearly evidences, Ameritech continually demonstrates a propensity to discriminate and take unwarranted actions against CLECs. The HEPO does not address these issues, but nonetheless finds that a combined SBC/Ameritech would neither hinder competition nor be more discriminatory. HEPO at 30-31.

1. Out of Service Trouble Reporting

21st Century witness Kristen M. Smoot demonstrated why parity does not exist when 21st Century trouble reports are compared to similar types of reporting between Ameritech affiliates. Specifically, Ms. Smoot explained how parity does not exist with respect to out of service trouble reporting because of the way Ameritech distinguishes between service orders and trouble reports. As Ms. Smoot testified, in the normal course of operations, equipment within the Ameritech collocated central office requires a Line Equipment Network ("LEN") change and a related Customer Facilities Assignment ("CFA"). 21st Century will request that Ameritech move the central office connection from the defective switch termination to a new termination. However, this request is categorized by Ameritech as a normal service order, in which Ameritech has 48 hours to supply a Firm Order Commitment ("FOC") and five (5) days to complete. 21st Century Ex. 1.0 at 4-5. This problem is compounded when 21st Century receives a customer trouble report after 5:00 p.m. on Friday. As Ameritech's witness acknowledged, because Ameritech only processes service orders between the hours of 7:00 a.m. and 5:00 p.m. Monday through Friday, the trouble report will receive no attention until, at the earliest, 7:00 a.m. Monday morning. Tr. 2424. This substandard form of service can be contrasted by the way Ameritech handles the situation when one of its retail customers issues the same type of trouble report. In this instance, Ameritech treats the problem as a trouble report that will be responded to within 24 hours. This type of trouble is not treated by Ameritech with the same level of urgency as it would treat trouble involving one of its retail customers.

Ms. Smoot's testimony provided a remedy to this lack of parity treatment. A two-part Service and Repair Performance Measure procedure would insure greater service and repair parity between Ameritech's affiliates and CLECs. The first part of the procedure analyzes past service and repair which the ILEC performed for its affiliates and CLECs. Substantive or procedural differences in treatment can thus be demonstrated. Secondly, current trouble handling processes are observed to determine mean repair times for ILEC affiliates and CLECs. Such a measure would allow for active participation by CLEC network operation center managers to input first-hand knowledge of specific issues and problems in obtaining service. 21st Century Ex. 1.0 at 6-7.

2. Address Validation

The second problem that 21st Century has encountered with Ameritech is the process of address validation. This process generally requires that both the ILEC and the CLEC use the ILEC's street address guide ("SAG"). However, due to a flaw in Ameritech's procedures, Ameritech periodically rejects 21st Century orders that exactly match Ameritech's SAG. On cross-examination, Ameritech witness Terry Appenzeller admitted that Ameritech occasionally intercedes, in what is supposed to be an electronic process, by making certain computer edits regarding coordinated "hot cuts" and "frame due times" which can cause order rejections. In other words, even though 21st Century correctly follows Ameritech's procedures to the letter, an order may be rejected by Ameritech. Furthermore, Ameritech often over-scrutinizes CLEC service orders, and will reject them for the slightest deviation from the SAG. Rejections of exactly matched addresses or those with very slight deviations have resulted in order rejection rates of twenty five percent in any given day. 21st Century Ex. 1.0 at 8. Each mis-match rejection automatically delays 21st Century a minimum of 48 hours. This again points to the lack of parity between Ameritech's treatment of CLECs and its retail customers.

3. Re-Use of Loops

The process of connecting a customer to a CLEC is a further example where Ameritech's policy fosters inefficiency and lack of parity. As Ms. Smoot testified, if a customer who changes from Ameritech to 21st Century wants a new telephone number, Ameritech's EDI does not support a process to handle a disconnect order for their old number that re-connects the new number to the previously used loop. 21st Century is therefore forced to order a new loop for the customer even though a loop exists that could be re-used. This requires that both Ameritech and 21st Century dispatch trucks to coordinate the removal of the jumper from one loop by Ameritech and the installation of another jumper to the new loop by the CLEC.

From a parity perspective, 21st Century and its customers are forced to incur extra time and expense that Ameritech witness Mr. Appenzeller admitted would not be incurred by Ameritech's customers. Tr. 2417. Ameritech's customers can change phone numbers without ordering an additional line and without issuing a separate disconnect order for their current number. Tr. 2417. According to Mr. Appenzeller's testimony, customers retain their existing number approximately 65% percent of the time. Tr. 2417. Therefore, by Ameritech's own admission, 35% of the time CLECs are forced to incur wasted time and expense to order a new loop for their customer, when customers could in many instances simply re-use the existing loop.

4. Collocation Commitment Dates

21st Century provided specific examples in the reopened proceeding to illustrate the problems and prejudicial treatment CLECs endure. These problems included Ameritech's documented failures in meeting its collocation commitment to 21st Century. Because of Ameritech's faulty engineering and lack of quality control, the contracted collocation space in the Franklin Central Street Office was delivered over three (3) months late and this placed extraordinary costs and inconvenience on 21st Century. 21st Century Ex. 1.0 at 13.

21st Century believes that this collocation problem is a prime example illustrating the importance of performance measures that track the quality of an ILEC's service. Without a precise method for measuring and a complete set of standards and penalties, Ameritech will choose to do whatever is in its financial, rather than service or equity related, interest.

5. Failure of Ameritech's Signal Control Point

CLECs necessarily depend on ILECs for many important business functions. For this reason, there should be frequent contact between the parties, especially during times of network trouble. On May 26, 1999 a major failure occurred in Ameritech's Signal Control Point ("SCP"). 21st Century Ex. 1.0 at 15. The failure caused an estimated one hundred thousand ported telephone numbers to be incapable of receiving calls. To further exasperate the problem, the callers, the majority of whom were trying to reach CLEC end user customers, heard a computer generated voice message that stated that the number had been disconnected. The outage was not only of great inconvenience to CLEC customers, but it was also extremely detrimental to the respective carrier's reputation. 21st Century Ex. 1.0 at 16.

21st Century learned of the outage through its customers, who understandably (and mistakenly) believed that 21st Century was to blame. Ameritech did not provide any information regarding the outage to 21st Century until over two weeks had passed. In the final analysis, the problem caused by Ameritech and its contractors had to be remedied by 21st Century, which was forced to address the incident with its customers, without the benefit of an explanation from Ameritech. For these reasons, Ameritech should be required to promptly inform its CLEC customers of any network outage, including specific technical information, so the CLEC can take appropriate steps to notify its customers.

6. Make Ready Requests

A final example of the lack of parity that 21st Century receives is in its make ready requests to Ameritech. Ameritech is required to "make ready" poles for the use by 21st Century in the build out of its fiber network. While 21st Century has had a pole agreement with Ameritech since 1996 and dozens of meetings and arrangements have been coordinated between the parties, Ameritech has not committed the resources necessary to meet the schedule originally developed between the parties. Tr. 2433. Meanwhile, Ameritech is on schedule with its own build out.

Therefore, 21st Century suggests that the Commission should strike the second full paragraph on page 30 and replace the stricken language with the following:

> Currently, Ameritech fails to provide service in parity with service provided to its own affiliates. Ameritech has repeatedly failed to ensure adequate OSS performance or meet service order obligations. Even after agreeing to collocation commitments, Ameritech is in the habit of breaking rather than honoring those commitments. Ameritech failed to promptly inform CLECs when an SCP facility contracted by Ameritech failed, leaving dozens of CLECs to explain the service outage to their customers. This Commission, therefore, finds it dubious that the merger would improve such a questionable service record towards CLECs and states that Joint Applicants' commitments are inadequate.

> The Commission finds that absent the imposition of strict conditions, the proposed merger would have a significant adverse impact on competition. First, the Commission believes that the proposed merger fails the guidelines set forth by the Department of Justice. SBC would have likely deconcentrated the market and obtained a significant share of the market. The merger eliminates that possibility. Second, the Commission believes it must go beyond the Department of Justice guidelines in determining if the merger would have a significant adverse effect on competition. Whether or not SBC would have deconcentrated the market or gained a significant market share, the fact remains that a combined company will exacerbate the difficulties that all providers - particularly small carriers - have had entering Ameritech's local exchange market. The Commission therefore finds that absent strict conditions that guarantee the development of local exchange competition, the proposed merger fails the criteria in the Public Utilities Act.

21st Century's position herein is based on the entire record and the inadequacy of commitments contained in the HEPO to protect against anti-competitive abuses by the merged entity. In the alternative, 21st Century's in its Brief on Reopening provided suggested language for inclusion in the proposed order. 21st Century's proposals include the following:

- Establish a performance bond sufficient to address violations by Joint Applicants in Illinois (See Covad Ex. 1.0 at 2).

- Initiate an expedited contested commission docket to implement a permanent common transport element.

- Require implementation of all 122 performance measures identified before the Texas Public Utilities Commission within 6 months following approval of the merger.

- Require the Joint Applicants to continue performance measure obligations for a minimum of 6 years following approval of the merger.

- Promulgate a Commission order mandating incident based liquidated damages shall apply to all interconnection agreements in effect at the conclusion of this proceeding as well as for all future interconnections agreements, effective upon the submission of a letter by the CLEC requesting incident based liquidated damages.

- Joint Applicants shall make all interconnection arrangements and agreements, whether negotiated or arbitrated, available to CLECs in Illinois. In order to comply with Section 252 (i), Joint Applicants request for a "similarly situated" caveat should be denied. In order to ease the administrative burden of this commission, Joint Applicants shall submit electronic versions to an essential repository of the ICC.

- The Commission should insist that SBC-Ameritech modify Interconnection Commitment A so that it will make available, upon a carrier's request, any method, term or condition of interconnection and nondiscriminatory access to unbundled network elements that SBC-Ameritech offers or provides in any other states, *i.e.*, including arbitrated terms and conditions.

- Joint Applicants may not establish a national local subsidiary within 6 years of the approval of the merger. Additionally, the Commission will initiate an investigation of Joint Applicant's use of affiliate entities, including review of the standards for determining when facilities provisioned from the ILEC are deemed unavailable for use by CLECs .

- The Commission should require the implementation of a service and repair performance measure. The measure will address past service and repair which the ILEC performed for its affiliates and CLECs. This allows for a determination whether there are substantive or procedural differences in the quality and performance of ILEC service and repair between its affiliates and CLECs. Secondly, current trouble handling processes are observed to determine mean repair times for ILEC affiliates and CLECs. Such a measure would

allow for active participation by CLEC network operation center managers to input first-hand knowledge of specific issues and problems in obtaining service.

CONCLUSION

For the aforementioned reasons, the Commission should deny the Application for Approval of the Reorganization of Illinois Bell Telephone Company and substitute the language indicated above in the Hearing Examiners' Proposed Order.

Dated: August 17, 1999

By: ___________________

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